No. 80-484

In the Supreme Court of the United States

OCTOBER TERM, 1980

PRINCE EDWARD SCHOOL FOUNDATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the dismissal of its suit for a declaratory judgment under Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C.) seeking reinstatement of its tax-exempt status as an organization operated exclusively for "educational purposes" under Section 501(c)(3) of the Code.

The pertinent facts are as follows: Petitioner was formed in 1959 as a nonprofit corporation to operate private elementary and secondary schools. The Internal Revenue Service ruled in that year, on a tentative basis,[1]

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[1] The prior practice of the Internal Revenue Service was to issue tentative determination letters to educational institutions and certain other organizations when the organization claiming exemption had been in active operation for less than one year at the time it submitted its application. See Rev. Rul. 54-164, 1954-1 Cum. Bull. 88.

that petitioner qualified for exemption under Section 501(c)(3) and was eligible to receive tax-deductible contributions. Letters issued to petitioner in 1960 and 1961 confirmed that its exempt status continued to be recognized in accordance with the initial tentative ruling (Pet. App. 4a-5a, 16a-17a).

By letter dated November 30, 1970, the Internal Revenue Service advised petitioner that thereafter it would not recognize as exempt any private school that failed to adopt and administer in good faith a racially nondiscriminatory admissions policy. Petitioner's president responded that each application for admission was accepted or rejected according to the judgment of its directors and their agents, and that it did not intend to change its existing admissions policy. On a subsequent audit, the examining agent determined that petitioner had failed to demonstrate that it had adopted a nondiscriminatory policy. The Internal Revenue Service accordingly proposed revocation of petitioner's exemption and, after petitioner had exhausted its administrative remedies, revoked the exemption retroactively to November 30, 1970. As stated in the notice of final determination, the revocation was based on petitioner's failure to satisfy the requirements of Revenue Procedure 75-50[2] and to demonstrate that it had adopted a racially nondiscriminatory policy (Pet. App. 5a, 16a-19a, 56a-57a).

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[2]Rev. Proc. 75-50, 1975-2 Cum. Bull. 587, sets forth the guidelines by which the Internal Revenue Service determines whether private schools seeking tax-exempt status have racially nondiscriminatory policies as to students, *e.g.*, (§ 2.01): "A school that does not have a racially nondiscriminatory policy as to students does not qualify as an

Petitioner thereupon instituted this suit in the United States District Court for the District of Columbia under Section 7428 of the Code for a declaratory judgment to reinstate its status as a tax-exempt organization. On the parties' cross-motions for summary judgment, the district court entered judgment for the government on the ground that petitioner had not carried its burden of proving its entitlement to tax-exempt treatment. The court found that petitioner had failed to establish that it was administering a racially nondiscriminatory admissions policy (Pet. App. 3a-4a, 10a-11a, 13a). The court of appeals affirmed per curiam (Pet. App. 1a-2a).

In *Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), aff'd, 404 U.S. 997 (1971), the court held a private school is not entitled to acquire or retain exempt status under Section 501(c)(3) of the Code unless it has a racially nondiscriminatory policy. As in any tax case, the burden of overcoming the Commissioner's determination that a private school does not have a nondiscriminatory policy is upon the school. The legislative history accompanying the enactment of Section 7428 makes clear

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organization exempt from Federal income tax." The Revenue Procedure further provides (§ 2.02):

> A school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith.

The Revenue Procedure thereupon sets forth a number of specific requirements that must be met by each school seeking to demonstrate that it has adopted a nondiscriminatory policy and is operating in accordance with that policy, *viz.*, the school must state in its charter, documents and catalogues that it has adopted a nondiscriminatory policy; publicize the policy at least once annually so as to effectively bring it to the attention of all racial segments of its community; and maintain records documenting, among other things, the racial composition of its students, faculty, and administrative staff.

that out of deference to the Tax Court's expertise regarding declaratory judgments in tax cases, and in the interest of creating a unified body of national precedents, the district court and Court of Claims should conform their practice in Section 7428 proceedings to the rules evolved by the Tax Court. H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 285-286 (1976); S. Rep. No. 94-938, 94th Cong., 2d Sess. 588 (1976). See *Animal Protection Institute, Inc.* v. *United States*, 42 A.F.T.R.2d 78-5850, 78-5854 to 78-5855 (Ct. Cl. Sept. 19, 1978). The district court's allocation of the burden of proof was accordingly governed by the Tax Court Rules applicable to declaratory judgment actions, which impose on the plaintiff the burden of proof with respect to the grounds set forth in the Commissioner's notice of determination. Rules of Practice and Procedure of the United States Tax Court (Jan. 1, 1974 (Sept. 30, 1977 amendment), Rule 217(c).

The courts below correctly held that petitioner did not meet its burden of proof. In *Griffin* v. *School Board*, 377 U.S. 218, 223, 231 (1964), this Court noted that petitioner was formed to operate private schools for white children in Prince Edward County as part of a design to "ensure * * * that white and colored children in Prince Edward County would not, under any circumstances, go to the same school." As petitioner concedes (see Pet. 3-4) and the district court found (Pet. App. 11a), petitioner was among the schools participating as intervenors in *Runyon* v. *McCrary*, 363 F. Supp. 1200 (E.D. Va. 1973), aff'd, 427 U.S. 160, 164 (1976). In the trial court in that case, it was conceded that these schools made race a factor in their "policies of exclusiveness." 363 F. Supp. at 1203. The record here is devoid of evidence suggesting that petitioner has taken any steps, whether by objective act or formal declaration, to dispel its "reputation" (Pet. 3) and

open its facilities to blacks on a nondiscriminatory basis. In almost twenty years of operation it has never enrolled or even received an application from a black child (Pet. App. 10a). Indeed, in a memorandum included in the administrative record in this case (A. 44),[3] petitioner conceded that it has not adopted a racially nondiscriminatory policy.

Petitioner seeks to excuse its failure to make the requisite showing (Pet. 10-12, 16-18, 19-20) on the grounds that its directors may have (Pet. 16) a First Amendment right to their belief in the value of segregated education. But that constitutional principle does not guarantee petitioner a right to tax-exempt status. By requiring petitioner to demonstrate that it is operating under a racially nondiscriminatory policy, the court below did not encroach upon any activity entitled to affirmative constitutional protection. See *Norwood* v. *Harrison*, 413 U.S. 455, 469-471 (1973); *Runyon* v. *McCrary, supra,* 427 U.S. at 175-176.

Nor does the outcome of this proceeding turn, as petitioner contends (Pet. 12-15), upon the propriety of the guidelines used by the Internal Revenue Service to rule on the exempt status of private schools.[4] While recognizing that these guidelines represent the position of the Commissioner (cf. *Dixon* v. *United States*, 381 U.S. 68, 72-75 (1965)), the district court entered judgment against

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[3] "A." refers to the separately bound record appendix filed in the court of appeals.

[4] The requirements of Rev. Proc. 75-50 which petitioner challenges are, in any event, fully in keeping with those the court in *Green* v. *Connally*, *supra*, 330 F. Supp. at 1177, 1179-1180, prescribed as necessary to safeguard the rights of black schoolchildren.

petitioner below on the ground that it had failed to show that it had adopted a racially nondiscriminatory policy, as required for tax-exempt status under Internal Revenue Code Section 501(c)(3). Petitioner's arguments as to the correctness of the guidelines are irrelevant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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